

**SHORELINES HEARINGS BOARD
STATE OF WASHINGTON**

LEONEL S. and ISLE K. STOLLAR,
husband and wife; PAUL B. and
MARGERY M. GREENAWALT, husband
and wife; PATRICK J. and SUZANNE C.
MILLER, husband and wife; STEPHEN and
FRANCINE SADOWSKY, husband and
wife; and MARK and CHERYL VREILING,
husband and wife,

Petitioners,

v.

CITY OF BAINBRIDGE ISLAND, and
STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondents.

SHB NO. 06-024

06-027

Consolidated

ORDER ON SUMMARY JUDGMENT

On October 10, 2006, the Department of Ecology (Ecology) moved for summary judgment on nine of the issues set out in the Pre-Hearing Order in this appeal. Ecology notes that the remaining issues from the Pre-Hearing Order involve factual disputes that must be resolved at hearing. Petitioners oppose the motion.

The Board hearing this matter was comprised of Kathleen D. Mix, William H. Lynch and Judy Wilson.

The following documents were received and considered in ruling on this motion:

ORDER ON SUMMARY JUDGMENT
SHB No.06-024 and 06-027
Consolidated

1. Respondent Department of Ecology's Memorandum in Support of Motion for Partial Summary Judgment.
 2. Declaration of Katharine G. Shirey in Support of Ecology's Motion for Partial Summary Judgment, with Exhibits A-E.
 3. Declaration of Elizabeth Renkor in Support of Ecology's Motion for Partial Summary Judgment, with Exhibits A-G.
 4. Declaration of Hugh Shipman in Support of Ecology's Motion for Partial Summary Judgment, with Exhibits A-B.
 5. Petitioner's Response to Ecology's Motion for Partial Summary Judgment.
 6. Declaration of Jenny Powell in Opposition to Ecology's Motion for Partial Summary Judgment, with Exhibits 1-4.
 7. Declaration of John L. Peterson, P.E. in Opposition to Ecology's Motion for Partial Summary Judgment, with Exhibit 1.
 8. Declaration of Robert F. Cousins, LG, LHG. in Opposition to Ecology's Motion for Partial Summary Judgment, with Exhibits 1-4.
 9. Ecology's Reply Memorandum in Support of Motion for Partial Summary Judgment.
- Based on the record and evidence before the Board on the motion for partial summary judgment, the Board enters the following decision.

Procedural Background

Five families living in five adjacent houses located on a bluff above a Bainbridge Island shoreline applied for a single conditional use permit to build a common bulkhead at the foot of

1 the bluff to protect their properties. The City of Bainbridge Island approved the permit for three
2 of the properties and denied it for the other two. Ecology denied the permit for all five of the
3 properties, concluding that the bulkhead did not meet the criteria listed in WAC 173-27-160 for a
4 conditional use permit. The property owners timely appealed these denials, and the cases were
5 consolidated before the Board. Ecology moves for Partial Summary Judgment on nine issues
6 listed in the Pre-Hearing Order, numbered and stated as follows:

- 7 4. Does Ecology's denial of the requested conditional use permit violate the
8 law, because it imposes criteria not set out in the SMP for a conditional
9 use permit and single-family protective bulkhead approval?
- 10 5. Is Ecology bound by the expert opinion of Petitioners' consultants, that all
11 of the Petitioners' homes, property and/or appurtenant structures are at
12 risk of loss because of wave erosion, based upon a geotechnical stability
13 risk analysis?
- 14 7. Does Ecology's denial of the conditional use permit incorrectly interpret
15 the SMP, in particular, by elevating general shoreline use policies over
16 specific use requirements applicable to single family protective
17 bulkheads?
- 18 8. Does Ecology's denial of the conditional use permit impermissibly fail to
19 take into account Bainbridge Island's approval of other applications for
20 single family protective bulkheads which are similar to Petitioners' joint
21 application, which approvals give content and meaning to certain
provisions of the SMP applicable to these types of project developments?
9. Was Ecology required to resolve doubts, if any, in terms of interpretation
of the law and facts in favor of Petitioners, on the basis that the SMA
exempts from shoreline permitting requirements a single family protective
bulkhead, and further accords a preference for approval of measures
required to protect single family residences from the adverse effects of
wave erosion, if occupied prior to January 1, 1992?
10. Under the doctrine of finality, was Ecology bound by the City of
Bainbridge Island's issuance of a Mitigated Determination of
Nonsignificance (MDNS) for the proposed bulkhead project?
11. Was Ecology required to presume that no probable, significant adverse
environmental impacts to the shoreline environment will occur when it
considered Petitioners' application for a conditional use permit approval?

1 The bluffs in the vicinity of petitioners' residences are classified as "feeder bluffs," which
2 are coastal cliffs that, through erosion, supply sediment to the beach and to the littoral system.
3 Feeder bluffs are considered important for maintaining beaches and habitat. The bluffs in the
4 area of the Harvey Road properties provide sediment that is transported north by wave action to
5 maintain beaches to the north. *Declaration of Shipman.*

6 Petitioners retained Aspect Consulting to prepare geotechnical reports to support the
7 application for a "hard" or armored bulkhead at the Harvey Road properties. The consultant
8 prepared an initial report (February 24, 2005), a supplementary report (August 8, 2005), and an
9 updated slope stability analysis (February 22, 2006). *Declaration of Cousins, Exs.2, 3, 4.* The
10 experts retained by the petitioners disagreed with Ecology's assessment that there were important
11 feeder bluffs that exhibited valuable geohydraulic processes critical to shoreline conservation
12 present on the properties. *Declaration of Cousins.* Petitioner's experts also opined, based on a
13 slope stability analysis, that a "hard" protective bulkhead was required to adequately protect the
14 homes on the bluff above the shoreline. *Declaration of Peterson.*

15 The Washington Department of Fish and Wildlife (WDFW) provided comments to the
16 City of Bainbridge Island on the Stollar bulkhead proposal on December 30, 2005, noting that
17 other options were available to the landowners that would meet their needs, while at the same
18 time protecting and maintaining forage fish spawning areas, critical salmonid prey sources and
19 effective migration corridors for salmon. WDFW suggested a "thorough biological evaluation"
20 of the bulkhead project and an assessment by an independent third party expert in the application
21 of soft bank shore protection options. WDFW based this recommendation on examples of other

1 successful soft bank protection projects in high bluff areas of Puget Sound. *Declaration of*
2 *Renkor*. The petitioners believe the Aspect Consulting report(s) were adequate and responsive to
3 the request by WDFW. *Declaration of Peterson*.

4 The BISMP is codified in the Bainbridge Island Municipal Code (BIMC). The section
5 relevant to shoreline armoring (revetments and bulkheads) is set out at BISMP Sec.16.12.310.
6 The BISMP requires a conditional use permit (CUP) for bulkheads in rural, semi-rural, and urban
7 environments if there are not revetments or bulkheads within 100 feet on either side of the
8 property. BISMP. 16.12.310 (B)(1). The petitioners applied for a CUP for the proposed
9 bulkhead under this provision of the BISMP. *Declaration of Renkor*.

10 The City of Bainbridge Island completed a State Environmental Policy Act (SEPA)
11 review of the bulkhead project, and issued a Mitigated Determination of Nonsignificance
12 (MDNS). Ecology did not comment during the city's SEPA process. *Declaration of Renkor*,
13 *Ex. C*.

14 On June 16, 2006, the City approved the permit, with 18 conditions, for three of the
15 properties (Vreiling, Sadowsky, and Miller), but denied the permit for the remaining two
16 properties (Stollar and Greenawalt). On June 27, 2006, the City submitted the permit application
17 to Ecology for review. On July 27, 2006, Ecology denied the permit for all five applicants.
18 Ecology concluded that the CUP should be denied because the proposal was not consistent with
19 the BISMP in several respects. Among several other factors, Ecology concluded that shoreline
20 hardening was prohibited where there were feeder bluffs with valuable geohydraulic or
21 biological processes that are sensitive to interference and critical to shoreline conservation.

Ecology also concluded that the applicants had not conclusively demonstrated that nonstructural solutions were unworkable. *Declaration of Renkor, Exs. D, E, F.*

On July 5, 2006, the Stollars and Greenawalts filed an appeal of the City's denial of the permit with this Board (SHB No. 06-024). On August 16, 2006, all five of the permit applicants appealed Ecology's denial to this Board (SHB No. 06-027). The Board consolidated the appeals by order of September 12, 2006.

Analysis

Summary Judgment Standard

Summary judgment is a procedure available to avoid unnecessary trials on formal issues that cannot be factually supported and could not lead to, or result in, a favorable outcome to the opposing party. *Jacobsen v. State*, 89 Wn.2d 104, 569 Wn.2d 1152 (1977). The summary judgment procedure is designed to eliminate trial if only questions of law remain for resolution. Summary judgment is appropriate when the only controversy involves the meaning of statutes, and neither party contests the facts relevant to a legal determination. *Rainier Nat'l Bank v. Security State Bank*, 59 Wn.App. 161, 164, 796 P.2d 443 (1990), review denied, 117 Wn.2d 1004 (1991).

The party moving for summary judgment must show there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton Franklin Title Co., Inc.*, 131 Wn.2d 171, 182; 930 P.2d 307 (1997). A material fact in a summary judgment proceeding is one that will affect the outcome under the governing law. *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). In a summary judgment, all facts

1 and reasonable inferences must be construed in favor of the nonmoving party. *Jones v. Allstate*
2 *Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Summary judgment may also be granted to
3 the non-moving party when the facts are not in dispute. *Impecoven v. Department of Revenue*,
4 120 Wn.2d 357, 365, 842 P.2d 470 (1992).

5 The Board concludes that there are no contested issues of material fact on Pre-Hearing
6 Order issues 4, 5, 7, 8, 9, 10 and 11, and that summary judgment should be granted to Ecology
7 on each of these issues. Summary judgment is denied on Pre-Hearing Order issues 12 and 13, as
8 resolution of these issues raise material issues of fact that go to the ultimate question of whether
9 the CUP was correctly denied by Ecology.

10 **Analysis of Issues**

11 For purposes of the summary judgment motion, Ecology has grouped the issues presented
12 in the Pre-Hearing Order into two categories, those that present questions as to the scope of
13 Ecology's Shoreline Management Act (SMA) review powers and those that go to whether
14 Ecology properly interpreted the SMA and BISMP in its review of the bulkhead proposal. This
15 Order will generally follow the same organization as presented in the motion for partial summary
16 judgment.

17
18 1. *Ecology is required to review the proposal under the SMA, and is not bound by the*
19 *conclusions of the MDNS for the proposed bulkhead project (Issues 10, 11).*

20 Stollar argues that Ecology is bound by the conclusions of the MDNS of "no probable,
21 significant adverse environmental impact" on the bulkhead project because Ecology did not

1 comment on, nor appeal, the proposed issuance of a MDNS. Stollar states that Ecology is
2 “barred” from alleging any defects in the environmental review as a result of its failure to
3 comment. Stollar cites *Kitsap County v. State Dept. of Natural Resources*, 99 Wn.2d 386, 662
4 P.2d 381 (1983), and *Samuel’s Furniture, Inc. v. State*, 147 Wn.2d 440, 54 P.3d 1194 (2002) in
5 support of this argument.

6 *Kitsap County v. DNR* does not stand for the proposition advanced by Stollar. While
7 Ecology concedes that lack of comment on the MDNS precludes an attack on the *adequacy* of an
8 EIS, and an appeal the City’s MDNS or SEPA process, Ecology is not bound to the substantive
9 conclusion made in the MDNS as it undertakes its review under the SMA. The Washington
10 Supreme Court has held that environmental determinations made by one agency during an
11 environmental review under one statute do not bind subsequent agencies which must make
12 environmental decisions under other applicable environmental laws, noting the unique nature of
13 SEPA as a supplement to the statutory authority of each agency. *Natural Resources v. Thurston*
14 *County*, 92 Wn.2d 656, 1601 P.2d 494 (1979). While the MDNS eliminates the need to produce
15 an EIS, it does not bind subsequent agencies that independently assess shoreline development
16 applications, including Ecology and this Board. *Bellevue Farm Owners Ass’n. v. Shorelines*
17 *Hearings Bd*, 100 Wn. App. 341, 997 P.2d 380 (2000). Because SEPA’s procedural
18 requirements overlay and add to other requirements in other applicable environmental statutes,
19 Ecology correctly reviewed the Stollar proposal under the SMA, which grants the agency
20 responsibility for many shoreline decisions, including conditional use permits. RCW 90.58.140.

1 Nor is Ecology “reversing” a local government decision to allow a project to go forward
2 without the need for a shoreline permit, as was the case in *Samuel’s Furniture*. Ecology is
3 simply carrying out its statutory responsibility to review a project which requires a CUP under
4 the BISMP. In doing so, Ecology must apply the SMA, with relevant implementing regulations,
5 to its review of the project. “Administrative finality” as Stollar advances that doctrine, comes
6 only after Ecology carries out its responsibilities under the statutory scheme that gives it
7 authority over variances and conditional uses. RCW 90.58.140. Summary judgment is granted
8 to Ecology on issues 10 and 11 from the Pre-Hearing Order.

9
10 2. *Ecology is not bound by the expert opinions of a consultant hired by a permit*
11 *applicant(Issue 5).*

12 Stollar asserts that Ecology is bound by the expert opinion of their geotechnical
13 consultants, but argues that it is premature to consider summary judgment on this issue until such
14 time as it is clear that Ecology has failed to prepare its own expert geotechnical analysis.

15 The SMA requires Ecology to approve or disapprove any permit for a variance or
16 shoreline conditional use. RCW 90.58.140(10). In review of developments that affect
17 shorelines, Ecology must ensure compliance with the SMA and not allow a development unless
18 it is consistent with the SMA, regulations, and local master programs. RCW 90.58.050, .140(1).
19 There is no authority for the proposition that Ecology must defer to or be bound by the expert
20 opinion of an applicant or other third party as it undertakes these responsibilities. To the
21 contrary, the agency itself is recognized as having technical expertise in a range of matters

1 related to environmental reviews. Both the courts and this Board routinely rely on the expertise
2 of Ecology staff in review of such matters. *See, Port of Seattle v. Pollution Control Hearings*
3 *Board*, 151 Wn.2d 568, 90 P.3d 659 (2004) (the court gives due deference to the specialized
4 expertise of Ecology on technical judgments, especially when they involve complex scientific
5 issues). Accordingly, Ecology is granted summary judgment on this issue.

6
7 *3. Ecology is not required to consider other land use decisions by the City in*
8 *determining whether to approve a CUP in this case (Issue 8).*

9 Ecology correctly argues that its review of a conditional use permit is independent of the
10 local government review, based on the policies and language of the SMA. RCW 90.58.140(10).
11 The Board has held that no action or set of decisions by a local government can override the
12 requirements of the SMA. *Morasch v. Ecology*, SHB No. 94-10(1994), and the Supreme Court
13 has observed that Ecology “can and should disagree with a local government decision when it
14 believes that it is in conflict with the SMA.” *Samuel’s Furniture*, 147 Wn.2d at 456, fn 14. The
15 Washington Supreme Court has also held that the proper action on a land use decision by an
16 agency cannot be foreclosed because of action in another case involving different property.
17 *Buechel v. Ecology*, 125 Wn.2d 196, 211, 884 P.2d 910 (1994).

18 In applying the review criteria for a conditional use permit, the applicant must
19 demonstrate that the proposed use of the site and design of the project is compatible with other
20 authorized uses and with uses planned for the area under the comprehensive plan and shoreline
21 master program. WAC 173-27-160(1)(c); *Jefferson County v. Seattle Yacht Club*, 73 Wn.App.

1 576, 590, 870 P.2d 987 (1994). To this extent, Ecology considers how the current proposal
2 complements and is consistent with other permitted uses in the vicinity. However, a
3 demonstration by the applicant that a particular use is a compatible use does not equate to a
4 requirement that the reviewing agency consider other land use decisions in the area as precedent
5 for how the agency must resolve the specific project under review for a CUP. Ecology is granted
6 summary judgment on this issue.

7
8 4. *The SMA does not require Ecology to resolve doubts in favor of protection of single*
9 *family residences. (Issue 9).*

10 Ecology is not required to resolve doubts in favor of single family residences as argued
11 by Stollar. Rather, Ecology (and this Board) must balance the protection offered for single-
12 family residences from damage or loss due to shoreline erosion, *see*, RCW 90.58.100(6), against
13 the protection offered to the public interest, which limits unrestricted construction on public and
14 private shorelines of the state, *see*, RCW 90.58.020, *Ecology v. City of Moses Lake*, SHB No. 02-
15 004 (2002) (*Order Denying Summary Judgment*). While the Stollar bulkhead proposal is exempt
16 under the SMP from the requirement to get a substantial development permit, the homeowners
17 are required to get a conditional use permit before the project can proceed. BISMP 16.12.310
18 (A), (B). The burden is on the applicants to demonstrate that the proposal meets all of the criteria
19 for a conditional use, set out at WAC 173-27-160. Thus, as matter of law, Ecology is not
20 required to apply the standard advanced by Stollar, and summary judgment is granted to Ecology
21 on this issue.

1
2 5. Ecology's denial of the requested conditional use permit did not impose "unadopted"
3 criteria not set out in the SMP for a conditional use permit for a single-family bulkhead. (Issue
4 4).

5 Stollar presents the issue that Ecology utilized "unadopted criteria" to assess the
6 application for the conditional use permit because the agency concluded that Stollar had not
7 presented evidence that "conclusively demonstrates that the nonstructural solutions to bank
8 stabilization are unworkable." In denying the CUP, Ecology applied the standard of BISMP
9 16.12.310(B)(5)(c), and considered the request by WDFW that there be an evaluation by an
10 independent, third party, expert in the application of soft bank shore protection methodology.
11 *Renkor Decl., Exs F, G.* Ecology concluded that Stollar had not presented evidence to meet this
12 standard, and that WDFW and the applicant's consultant disagreed regarding whether
13 nonstructural methods were unworkable at the site. *Declaration of Renkor, Ex. F.*

14 The BISMP provides as follows:

15 5. Revetments and bulkheads may be allowed only **when evidence is**
16 **presented which conclusively demonstrates** that the following conditions
exist:

- 17 a. Serious wave erosion threatens an existing development or land;
18 b. Bulkheads or revetments may be approved for the operations
19 and location of water-dependent and water-related activities consistent with
20 the master program; provided, that all alternatives have proven infeasible (i.e.,
21 use relocation, use redesign, nonstructural shore stabilization options). Such
bulkheads or revetments must meet other policies and regulations of this
chapter; and

1 *c. That use of natural materials and processes and nonstructural*
2 *solutions to bank stabilization are unworkable in protecting existing*
3 *development.*

4 BISMP 16.12.310 (B)(5). (emphasis added).

5 Based on this language, if Ecology was not satisfied with existing information from the
6 applicants, it had the authority to request additional information and study as to the use of natural
7 materials and nonstructural solutions to bank stabilization. Moreover, the BISMP sets a
8 relatively high standard before it will allow a bulkhead (evidence that “conclusively
9 demonstrates” that the use of natural materials and processes and nonstructural solutions are
10 unworkable). Given this standard and the comments from WDFW, Ecology did not impose
11 criteria other than that set out in the BISMP for review of bulkhead proposals, and properly
12 concluded that additional evidence was necessary before a CUP could be authorized under the
13 BISMP.

14 Although it is appropriate to grant summary judgment to Ecology on this issue (i.e. did
15 the agency impose “unadopted criteria” on the CUP review), the Board notes that there is
16 disagreement on whether nonstructural solutions to bank stabilization are unworkable on
17 Petitioners’ properties under the requirements of BISMP 16.12.310 (B)(5). *Declaration of*
18 *Peterson*. Such factual questions are also related to the issue of whether there are valuable
19 geohydraulic or biologic processes sensitive to interference and critical to shoreline conservation
20 at work in the Stollar bluff area (Issue 13). Such factual questions are appropriate for hearing in
21 this matter.

1
2 6. *Ecology's denial of the condition use permit did not elevate general shoreline use*
3 *policies over the specific use requirements applicable to single family protective bulkheads*
4 *(Issue 7).*

5 Ecology's denial of the conditional use permit was based on the two primary conclusions:
6 1) that the proposed use was inconsistent with the policies of the SMA and the Bainbridge Island
7 Shoreline Master Program, under WAC 173-27-160(1)(a), and, 2) that there would be a
8 cumulative impact that would change the character of the shoreline in the area if the CUP were
9 granted, under WAC 173-27-160(2).

10 In assessing whether the bulkhead project was consistent with the BISMP, Ecology
11 looked to a number of specific provisions in the BISMP, including the limitations and
12 prohibitions on shoreline hardening in certain areas, the preference for use of natural materials
13 and nonstructural solutions to bank stabilizations, and whether there were valuable geohydraulic
14 or biological processes sensitive to interference and critical to shoreline conservation. Each of
15 these were aspects of the "shoreline armoring" regulations of the BISMP and, by their terms,
16 applicable to single-family bulkhead proposals on Bainbridge Island. BISMP 16.12. 310;
17 *Renkor Decl., Ex. F.*

18 The record does not support Stollar's claim that the decision to deny the CUP was based
19 on general shoreline policies and not on specific shoreline regulations applicable to bulkheads
20 proposed in single family residence situations. Ecology is granted summary judgment on this
21 issue.

1
2 **7. *The question of whether Ecology’s cumulative impact analysis is legally and factually***
3 *flawed on various grounds raises material questions of fact that must be resolved at hearing*
4 *(Issue 12).*

5 WAC 173-27-160(2) requires consideration of the cumulative impact of additional
6 requests for like actions in the area. The Board has denied summary judgment in other cases in
7 order to consider factual issues relevant to the application of conditional use or variance criteria,
8 including the question of whether there will be a cumulative impact should a CUP be granted.
9 *Wriston v Ecology*, SHB 05-005 (2005) (*Order on Summary Judgment*). Ultimately, in *Wriston*,
10 the Board looked at a number of facts, including the nature of the shoreline, land use patterns,
11 access, and other factors, to assess whether Ecology properly assessed the cumulative impact of
12 the conditional use. *Wriston v. Ecology*, SHB 05-005 (2005) (*Final*); *See also, Snow & King*
13 *County v. Ecology*, SHB No. 98-020 (1998). Ecology’s proffered reasons for disallowing the
14 Stollar bulkhead due to the cumulative impact also raises questions of fact that require testimony
15 at hearing (e.g., can Ecology provide the factual basis for its conclusion that other properties will
16 be able to build without permits). Because resolution of this issue requires the board to consider
17 facts not currently before it, summary judgment is denied on this issue.

18
19 **8. *The question of whether Ecology can deny approval of the CUP on the basis that some***
20 *features such as “feeder bluffs” are in the vicinity of the proposed bulkhead project, where*

adequate mitigation may be available to ameliorate project impacts, raises material questions of fact that must be resolved at hearing (Issue 13).

Ecology argues that the BISMP prohibits bulkheads on shores where feeder bluffs are located because such bluffs are a sensitive shoreline environment. Ecology interprets the provisions of the BISMP as an outright prohibition of bulkheads “on shores where valuable geohydraulic or biological processes, including feeder bluff, are sensitive to interference and critical to shoreline conservation.” BIMC 16.12.310(C)(4). The relevant section of the SMP reads as follows:

C. Prohibited

1. Gabions (wire mesh filled with concrete or rocks) are prohibited in bulkhead construction.

2. Revetments and bulkheads shall be prohibited for any purpose if they will cause significant erosion or beach starvation.

3. Construction of a bulkhead, revetment, or other armoring structure for the purpose of retaining a landfill or creating dry land is prohibited, unless it is proposed in conjunction with a water-dependent or public use.

4. Shoreline hardening (i.e., revetments, bulkheads, seawalls) shall not be located on shores where valuable geohydraulic or biological processes are sensitive to interference and critical to shoreline conservation such as feeder bluffs, marshes, wetlands, or accretion shoreforms such as spits, hooks, bars, or barrier beaches.

BISMP 16.12.310(C) (emphasis added).

The parties agree that the petitioner’s properties are located within a “feeder bluff” section of Bainbridge Island. *Declarations of Shipman, Peterson; Cousins*. However, Stollar argues that there must be a site-specific geotechnical analysis to determine if, in fact, valuable geohydraulic and biological processes are present which are sensitive to interference and critical

1 to shoreline conservation. Stollar asserts that only by such a study and review of such evidence
2 can an agency determine that their proposed bulkhead is located in a manner to harm or interfere
3 with valuable feeder bluff processes. Ecology relies on *Kovalik v. Whatcom County*, SHB No.
4 96-30 (1997) for the proposition that the Board has upheld the denial of a permit for a bulkhead
5 in a situation where it would harden the shoreline at the base of a feeder bluff. However, *Kovalik*
6 was decided after a full hearing, and the Board looked at a number of facts in relation to the
7 Whatcom County SMP, including whether the appellants in that case had proven that alternatives
8 to constructing hard shore defense works were infeasible.

9 The prohibitory section of the BISMP carves out four areas where bulkheads and
10 revetments which might otherwise be allowed by the regulation, are prohibited. However,
11 whether a particular proposed bulkhead is designed or located in a manner prohibited by this
12 section may involve disputed issues of fact. Section C 4 prohibits bulkheads on shorelines where
13 certain conditions exist (“where valuable geohydraulic or biological processes are sensitive to
14 interference and critical to shoreline conservation...”). The petitioners dispute whether
15 “valuable geohydraulic processes” are at work in the shoreline area of their residences. They
16 present facts that suggest impact to the feeder bluffs is capable of mitigation so as to not interfere
17 with processes critical to shoreline conservation. *Declarations of Peterson; Cousins*. As a result
18 the Board concludes that there are material disputed facts that must be resolved after hearing on
19 the merits, and are not capable of resolution on summary judgment.

1
2 **ORDER**

3 Summary Judgment is GRANTED to Ecology on Issues 4, 5, 7, 8, 9, 10, 11 as identified
4 in the Pre-Hearing Order. Summary Judgment is DENIED on issues 12 and 13 from the Pre-
5 Hearing Order and those matters will be set over for the hearing on the merits.

6 SO ORDERED this 9th day of January 2007.

7 **SHORELINES HEARINGS BOARD**

8 Kathleen D. Mix, Presiding

9 William H. Lynch, Chair

10 Judy Wilson, Member
11
12
13
14
15
16
17
18
19
20
21